IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRI.WRIT PETITION NO. 2665 OF 2005

Shri Vijay Vasant Dhavale ... Petitioner

V/s

M/s Beena Enterprises & Ors. ... Respondents

Shri.G.B.Bhatt for petitioner

Shri M.S.Mohite with Mr. Shailesh Kantharia for respondent No.1.

Shri A.M. Shingarpure, APP for the State.

Coram : V.M. Kanade, J.

Dated : 12/04/2005.

P.C. :-

1 The petitioner is challenging the order of issuance of process passed by the Judicial Magistrate First Class, Palghar on the complaint filed under sections 138 and 141 of Negotiable Instruments Act by the complainant.

2 It is submitted by the learned counsel appearing on behalf of the petitioner that there are no averments in the complaint that the petitioner was incharge and responsible for the day to day affairs of the company except bare

statement that the petitioner was a Director of the company.

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It is further submitted that the petitioner become one of the Director along with three others in the year 1994. However, the respondent No.2 as the Managing Director was acting arbitrarily and never consulted the other Directors. The respondent No.2 had entered into agreement with the respondent No.1 on 29/10/1996. It is further submitted that the respondent No.2 had removed the petitioner from the Directorship on 10/10/2000 and, therefore, he filed winding up petition against the respondents No.2 and 3 in this court. The respondent No.1 thereafter executed letter of appointment and indemnity bond dated 10/4/2002. It is further submitted that the respondent No.2 also filed form-32 as Managing Director for re-appointing the petitioner as Director on 17/04/2002. It is further submitted that before filing the complaint, the respondent No.1 threatened the petitioner by letter dated 9/12/198 not to transfer a flat in favour of the respondent No.2 failing which his name would be inserted in the complaint. The petitioner initially had filed an application for recalling process in the trial court. However, that application was rejected by the trial court.Against the order of trial court, the petitioner preferred revision application in the Session Court at Palghar. However, the revision application was rejected in view of the judgment of the Supreme Court in **Adalat Prasad.** The learned counsel appearing on behalf of

the petitioner has relied on the judgments of the Supreme Court in the cases of **K.P.G.Nair v. M/s Jindal Menthol Ind.Ltd**. reported

in **2001 ALL MR (Cri.)1206, Maniben Khetanbai Shah & Ors. v. State of Gujrat & Ors.** reported in **2004(2)Bankers Journal 906, Katta Sujatha v. Fertilizers Chemicals Travel & Ors**. , reported in **(2002)7 S.C.C. 655 and State of Hariyana v. Brijlal Mittal & Ors.** reported in **AIR 1998 S.C.2327**.

3 The learned counsel appearing on behalf of the respondent No.1 has submitted that in the complaint there are specific averments to the effect that accused No.1 is the company and accused No.2 and 3 are the Directors on behalf of the respondent No.1. It is further stated in paragraph-6 of the complaint that accused were issued five cheques signed by the accused No.2 on behalf of the accused No.1 to discharge their liability against the payment of the construction bill to the complainant. He has brought to my notice other averments in the petition where specific reference were made of the accused No.1 to 3.He has submitted that therefore the statement of the petitioner that there are no averments in the complaint is incorrect. He has submitted that question as to whether petitioner was in charge and responsible for the business of the accused No.1 can be ascertained and determined only after the evidence is adduced by both parties. He has

brought to my notice the letter of appointment in which it is stated that the petitioner has 50% share holding in the company. It is further submitted that the petitioner would not be removed unless he pays the value of his share holding. It is

submitted by the learned counsel for the respondents that the accused had signed four cheques out of five dishonoured cheques and on this count the petitioner has been impleaded as accused. The learned counsel for the respondent No.1 has submitted that the ratio of the judgment on which reliance is placed by the petition are not applicable to the facts of the present case.

5 I have heard both parties at length. There cannot be any straight-jacket formula for the purpose of deciding an issue whether the averments in the complaint and manner in which they are made responsible for the affairs of the respondent No.1 company are sufficient or not.Thus, each case would have been decided on the facts and circumstances. There can be no dispute regarding the ratio laid down by the Supreme Court in the judgments on which reliance is placed by the learned counsel for the petitioner.

6 However, in my view,the ratio of the said judgments would not be applicable to the facts of the present case for the following reasons. The allegation of the

complainant is that accused had signed cheques which were issued on behalf of the company and the averments clearly indicate that he was the Director of the company when the cheques were issued. This fact has not been disputed by the petitioner in the application for recalling the order of issuance of process which was preferred before the Magistrate.There is

also no denial of the letter of appointment issued by the Managing Director in which it is stated that the petitioner has 50% share holding in the company. In the affidavit in reply filed by the respondent No.1 it is stated that the petitioner has been impleaded as accused as he had signed four cheque bearing No.115991 to 115994.Thus, the petitioner himself has stated that there are four Directors of the company and that the complaint had been filed only against the petitioner and the respondent No.2. The petitioner has not disputed the receipt of statutory notice dated 12/1/1999 which was received by him on 19/1/1999. The trial court also while disposing of the application filed by the petitioner has observed that the dishonoured cheques were signed by him and, therefore, it could not be said that he was not responsible for the affairs in the company and it is not possible unless he is the Director. The petitioner has not disputed that he is one of the signatory of the dishonoured cheques. Though the reliance has placed by the learned counsel for the respondent No.1 on indemnity bond annexed with Exhibit 1 to the affidavit in rejoinder.

From perusal of the indemnity bond it can be seen that it is signed by the respondent No.2 who was the Managing Director of the accused No.1 company. In my view, there are sufficient averments to indicate that the petitioner is incharge and responsible for the affairs in the company. Criminal writ petition is accordingly dismissed.

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7 The petitioner is however exempted from appearing in the trial court from appearing in the trial court. Plea of the petitioner will be recorded through his advocate and unless his presence is absolutely necessary for the purpose of trial, the Magistrate may not directe him to remain present in the court. All the questions which are raised in this petition are kept open.The trial court is directed to decide the case as expeditiously as possible, in any case within a period of 6 months.

Parties to act on authenticated copy issued by the Registry.

(V.M. Kanade,J.)